

LAWYER
ARIZONA ATTORNEY GENERAL

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

March 17, 1969

DEPARTMENT OF LAW OPINION NO. 69-11 (R-62)

REQUESTED BY: J. KENDALL HANSEN
Apache County Attorney

- QUESTIONS:
1. Can the County Assessor lawfully require Navajo Indians, living on the Navajo Reservation, to pay the auto lieu tax as a condition of obtaining vehicle license plates and registration in the State of Arizona?
 2. If the lieu tax is unlawful, must the tax which has been collected be refunded, and if so, how?
 3. If the answer to No. 1 is no, what should be done when a Navajo drives his vehicle on a State highway within the confines of the exterior boundaries of the Reservation, or drives off the Reservation in the State of Arizona?

- ANSWERS:
1. See body of opinion.
 2. See body of opinion.
 3. See body of opinion.

I.

The Arizona Enabling Act of June 20, 1910, c. 310, 36 U. S. Stat. 557, provides, in part, as follows:

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands

Opinion No. 69-11 (R-62)
March 17, 1969
Page Two

and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

In accordance with Section 20 (Second), Article 20, paragraphs 4 and 5 of the Arizona Constitution were enacted:

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

"Fifth. The lands and other property belonging to citizens of the United States residing without this State shall never be taxed at a higher rate than the lands and other property situated in this State belonging to residents thereof, and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by an Indian; but nothing herein shall preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress."

No subsequent amendment has modified or abrogated the plain meaning of these quoted paragraphs.

The in-lieu tax upon registered motor vehicles is imposed in accordance with Article 9, Sec. 11 of the Arizona Constitution. Collection and distribution of this tax is controlled by A. R. S. Secs. 28-1591, and 28-1593 (1956).

The in-lieu tax is a tax upon property, and because motor vehicles owned or held on an Indian Reservation by Indians constitute "other property within an Indian Reservation owned or held by any Indians", the County Assessor may not lawfully assess the in-lieu taxes upon such vehicles as a condition to registration thereof. Art. 20, paragraph 5, Arizona Constitution. The County Assessor must charge the registration fee of \$6.25, including any additional penalty, where a reservation Indian applies for registration and license plates. This opinion is, however, specifically limited to vehicles owned by an enrolled member of a recognized Indian tribe whose legal residence is within the exterior boundaries of a regularly established, approved and recognized Indian reservation.

II.

Section 42-204, A. R. S. (1967 as amended), provides the following procedure where a tax is alleged to have been assessed unlawfully:

"A. Any person upon whom a tax has been imposed or levied under any law relating to taxation shall not be permitted to test the validity or amount thereof, either as plaintiff or defendant, unless the tax is first paid to the county treasurer authorized to collect the tax, together with all penalties thereon.

"B. No injunction, writ or mandamus or other extraordinary writ shall issue in any action or proceeding in any court against the state or an officer thereof, or against any county, municipality or officer thereof, to prevent or enjoin the extending upon the tax roll of any assessment made for tax purposes, or the collection of any tax imposed or levied.

"C. After payment of the tax, an action may be maintained to recover any tax illegally collected, and if the tax due is determined to be less than the amount paid, the excess shall be refunded in the manner provided by this chapter. "

In a previous opinion of this office, Attorney General's Opinion No. 66-12, it was held that the County Assessor has no "obligation, duty or

Opinion No. 69-11 (R-62)
March 17, 1969
Page Four

authority" to refund in-lieu taxes in the absence of a proper judicial proceeding. This opinion is specifically affirmed on the grounds stated therein.

The procedure outlined in A. R. S. Sec. 42-204 (as amended 1967) must be "scrupulously followed" even where a tax is illegally collected. Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P. 2d 770 (1963). It seems the concensus of cases determined by the appellate courts of Arizona that a prerequisite to recovery of an alleged illegal tax is the payment of the tax under protest. Southern Pacific Co., supra; Drachman v. Jay, 4 Ariz. App. 70, 417 P. 2d 704 (1966); Arizona Eastern Ry. Co. v. Graham County, 20 Ariz. 257, 179 P. 959 (1919). In the recent case of State Tax Comm. v. Superior Court, et al., No. 9499 (filed February 6, 1969), the Arizona Supreme Court specifically holds that "Involuntary payment of taxes under protest is a condition precedent to the bringing of an action to recover such taxes."

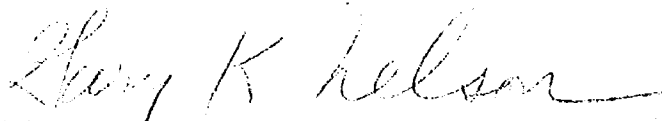
In summary of the answer to Question 2, the only authorized procedure for recovery of the tax paid is that specified in A. R. S. Sec. 42-204 (as amended 1967), and any other refunding procedure would be contrary to law.

III.

In a previous opinion, Attorney General's Opinion No. 58-71, the question presented was whether the Arizona automobile vehicle registration laws could be enforced against reservation Indians on any roads within an Indian reservation. In concluding that these laws could not be enforced with respect to vehicles owned and operated by Indians on a reservation, In re Denetclaw, 83 Ariz. 299, 320 P. 2d 697 (1958), was cited in support of this conclusion. This case remains the law of this State with regard to the question at hand.

With regard to vehicles owned and operated by Indians outside the exterior boundaries of the reservation, such vehicles must be properly registered under the laws of Arizona. The immunity from registration applies only to vehicles owned and operated entirely within the exterior boundaries of reservations. The burden is upon the individual Indian owner to obtain proper registration if he intends to operate his vehicle off the reservation. But the immunity from payment of in-lieu taxes remains, whether on or off reservation operation of the vehicle is contemplated, provided that such Indian owner's legal residence is within the exterior boundaries of the reservation.

Respectfully submitted,


GARY K. NELSON
The Attorney General